IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1325 of 2003
With
CRIMINAL APPEAL NO.222 OF 2004

HONOURABLE MR.JUSTICE ANIL R. DAVE

HONOURABLE MR.JUSTICE KS JHAVERI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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POPATLAL GOVARAM THAKAR(JOSHI) - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance : [In Cr.A.No. 1325 of 2003]
MR VIPUL S MODI with MR GIRISH K. PATEL for Appellant(s) : 1,
MR K T. DAVE ASST. PUBLIC PROSECUTOR for Opponent(s) : 1,

Appearance : [In Cr.A.No. 222 of 2003]

MR K T. DAVE ASST. PUBLIC PROSECUTOR for Appellant(s) : 1,

MR VIPUL S MODI with GIRISH K. PATEL for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE

and

HONOURABLE MR.JUSTICE KS JHAVERI

Date : 16/04/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE KS JHAVERI)

1.1 Criminal Appeal No.1325 of 2003 is directed against the judgement and order dated 10th October 2003 passed by learned Additional Sessions Judge (Fast Track Court), Banaskantha District, Palanpur in Sessions Case No.210 of 2001 whereby the Sessions Court has convicted the present appellant-original accused no.1 for offence under section 304 (Part I) of IPC and sentencing him to rigorous imprisonment for seven years and to pay a fine of Rs.50,000/-, in default to undergo further simple imprisonment for two years.

1.2 By the said judgment and order the Sessions Court had acquitted original accused nos.2, 3 and 4 against which the State has filed Criminal Appeal No. 222 of 2003. The State has also prayed for enhancement of the sentence imposed upon the original accused no.1.

2.0 The prosecution case in a nutshell are as under:

2.1 On 13th July 2001 at about 4 p.m. Champaklal Hiralal Joshi was sitting in his cabin along with his son Gaurishankar, his servant - Dineshbhai Koli and some other persons. The said cabin is situated on the road going to Panthawada from Bapla. One Dahyabhai Mafabhai, Keshabhai Malabhai and others were sitting across the road near the said cabin. At that time, Popatbhai Govaram, the original accused no.1 (hereinafter referred to as the appellant) had come to the cabin along with two unknown persons on a motorcycle and had taken tea. After taking tea the appellant started quarreling with said Champaklal by saying that Champaklal was considering himself to be a 'Dada' in the village and as to why he was keeping relations with one Ashok who was accused of assaulting the elder brother of the appellant. Thereafter the appellant got enraged and in a fit of anger pulled out a knife from his pocket and gave one blow to Champaklal. The other two persons had also tried to attack Champaklal, but one Dhansukhbhai Maheshwari and Gaurishankar - son of Champaklal, intervened and prevented any further injury to Champaklal.

2.2 Injured Champaklal was immediately moved to Panthawada Government Dispensary and since he could not be treated there, he

was advised to take necessary treatment from Civil Hospital at Palanpur at about 18.15 hours and Yadi was sent to Palanpur Police Station at about 1840 hours. The same was recorded in the police Dairy and FIR was lodged (Exhibit 87) and the Executive Magistrate has recorded his dying declaration (Exhibit 75) at about 1930 hours.

2.3 However, he was thereafter taken to Civil Hospital, Ahmedabad at about 0005 hours on 14th July 2001. Necessary tests were taken and an operation was performed at about 6.30 pm. His condition was good for two days after the operation was performed on 14th July 2001. On 17th July 2001 his pulse was on higher side and breathing was fast. Therefore on 18th July 2001 a second operation was performed. Ultimately, Champaklal succumbed to the injuries on 21st July 2001. Postmortem was carried out and the Post Mortem notes states “Cardio-Respiratory failure as a result of complication of stab injury over abdomen” as the cause of death.

2.4 The trial court after appreciating the evidence on record acquitted the original accused nos.2 and 3 of the charges levelled against them, but found appellant guilty for the offences alleged against him and sentenced him to suffer the sentence as stated above. It is against this

judgement and order, the appellant has filed the appeal and the State has filed appeal against the acquittal of the original accused nos.2 to 4 and for enhancement of the sentence imposed upon the appellant – original accused no. 1.

3.0 Learned Advocate for the appellant submits that the deceased is the cousin of the accused and there was no intention to kill him. He submitted that because of the heated argument and at the spur of the moment, the incident has happened and, therefore, it cannot be treated as a 'murder', but only “culpable homicide” and the conviction must be under section 304 Part II instead of section 304 Part I of IPC. He submitted that a conjoint reading of the evidence on record it is evident that there was no intention on the part of the accused to cause death of the deceased and it is only the heated argument which led to the unfortunate incident.

3.1 Learned Advocate for the appellant has relied upon the following decisions:

3.2 Decision of the Apex Court in the case of Bhera Vs. State of Rajasthan, reported in (2000) 10 SCC 225 wherein it is held that in

case where the accused and deceased while quarrelling, accused in anger suddenly bringing out a knife and giving blow on chest of the deceased which resulted in his death, it cannot be said that the accused gave the knife blow with the requisite intention of causing murder of the deceased. It was. therefore, held that the offence would be one under section 304 Part II and not under section 302.

3.3 In the case of Ram Prakash Singh Vs. State of Bihar, reported in (1998)9 SCC 497 it is held that where the accused inflicted single knife blow after hot exchange of words and the post-mortem report opined that the injury was not sufficient to cause death, the conviction for murder is required to be modified to culpable homicide. Similar principle has been laid down in the case of Surinder Kumar V. Union Territory, reported in AIR 1989 SC 1094 and in the case of Sukhbir Singh V. State of Haryana, reported in 2002(2) GLH 313.

3.4 In the case of Kishan Chand V. State of Punjab, reported in AIR 1994 SC 32 where, on the fact that accused inflicting single blow and injured dying after two weeks of incident, it was held that the accused was guilty of culpable homicide not amounting to murder.

3.5 In the case of Jusab Usman V. State, reported in 1983(2) GLR 1148 it is held that in that case it was a sudden fight and quarrel and exception 4 to section 300 was attracted.

4.0 Mr. K. T. Dave learned Advocate appearing for the State has submitted that the Sessions Court has wrongly acquitted the accused nos.2 and 3 merely because identification parade was not carried out and that the accused no.4 was not found to be present. He submitted that accused nos.2 and 3 were present at the place of incident and therefore, it was proved that they were also involved in the alleged incident.

4.1 Learned Advocate for the State submitted that the appellant had carried a weapon when they came to the place of incident. This would itself show that the appellant had intention to attack the deceased and, therefore, the Sessions Court ought to have held that the conviction should be under section 302 of IPC instead of section 304 Part I. He, therefore, submitted that the sentence imposed upon the appellant requires to be enhanced.

4.2 Learned APP has relied upon a decision in the case of Patel Rasikbhai B. vs. State, reported in 1999(1) GLR 717 wherein various

factors are pointed out to be kept in mind while appreciating evidence of injured witness stated. In the case of Raj Kishore Jha Vs. State of Bihar, reported in 2004 SCC (Cri) 212 it is held that the Court is required to appreciate the evidence and non-reasoned conclusions by appellate courts are not proper.

5.0 Shri Shamaldas Mohanlal (PW1-Exh.26) was examined by the prosecution. He was a medical officer at General Hospital, Palanpur. According to him, on13th July, 2001 at about 6.15, he was on duty and he had examined the injured Champaklal. He stated that upon examination, it was found that on the left hand side of the abdomen a wound was noticed about 1½ inch in size inflicted by a sharp weapon. Blood was coming out and the person was conscious. The pulse of the person was counted. However, the temperature of the body had considerably reduced. The patient was transferred to Civil Hospital for treatment. The witness has produced injury certificate Exh.27 and Yadi which was sent to police station (Exh.28) and also produced Xerox copy of the refer note being Exh.29. The OPD case paper is produced at Exh.31. As per this witness the patient had stated before him that his cousin brother Popat had attacked with a 'Chappu' by stating that he was considering himself to be a 'Dada' in that village. Champaklal was

treated by Dr. Ranjana Jain. The case papers were produced at Exh.32. This Doctor was examined at length and he had stated that the injury was caused with a sharp weapon and since the injury was very serious he was transferred to Ahmedabad Civil Hospital. He stated that the general condition of the patient was good.

5.1 The prosecution has examined Gaurishankar Champaklal Joshi (PW-9) son of the deceased was examined at Exhibit 50. He stated that on the day of the incident at about 4.00 pm he, his father - Champaklal, Dhansukhbhai Ganeshji Maheshwari, Keshabhai Malaji Barot and one Dahyabhai were at the cabin. At that time, Popatlal Govaram Joshi, his cousin brother along with two unknown persons came there on a Motor cycle bearing No.RJ-16-M-9641. Initially, they were talking with his father and the accused no.1 asked his father to prepare tea. After taking tea, the accused no.1 offered money to the father of this witness, but, he refused to take money. Thereafter, the accused no.1 asked the father of this witness as to why he is keeping relation with one Ashok Shamalaji, which was denied by the deceased and he had asked proof for the same. Thereupon, the accused no.1 got enraged and took out a 'chappu' from his pocket and attacked his father - Champaklal on the left side of abdomen. Other two persons also tried to attack him, but

because of intervention of Dhansukhbhai and others, Champaklal was saved from the second attack. Thereafter, the accused no. 1, along with accused nos. 2 & 3, drove away on motor cycle towards Panthavada. Champaklal was taken to Panthavada government hospital. After giving preliminary treatment he was sent to Civil Hospital, Palanpur and thereafter on the advise the injured was sent to Civil Hospital, Ahmedabad. This witness had accompanied his injured father to Civil Hospital, Ahmedabad. In Civil Hospital, Ahmedabad, the injured was operated and treatment was given for 7 days. On 21st July 2001, in the early morning, during the course of treatment, Champaklal expired. The police recorded his statement on 21st July 2001 and second statement was recorded after three days and he identified accused nos. 2 and 3. After four days thereafter, fourth statement was recorded. This witness has also identified the weapon in question. This witness had identified all the three accused and stated that they had come on vehicle on the day of the incident. He has also identified the clothes and other articles produced by the prosecution.

5.2 One Dineshbhai Hamorji Kali (PW-11) was examined at Exh.15. This witness has been employed in the shop of the deceased for the last two years. He has narrated the complete incident. He has stated that on

the day of the incident at about 4 O' clock, the accused had come to the tea-stall. They asked Champaklal to prepare tea. Some talk was going on with regard to relationship with one Ashok and the appellant got enraged, took out a knife and inflicted a blow on Champaklal. At the same time, the other two people also attacked the deceased but, due to the intervention of Gaurishanker and Dhansukhbhai, Champaklal escaped. Thereafter, the deceased has fallen down and the accused drove away on the motor-cycle. Champaklal was given first aid and he was taken in a jeep to Panthavada hospital. His statement was recorded on the next day of the incident. The accused were identified by this witness.

5.3 Dr. Ruthvij Bharatbhai Parikh (PW21) was examined at Exh.88. He was a Medical Officer at B.J. Medical College, Ahmedabad. He was present at the time of both the operations conducted on 14th July, 2001 and 18th July, 2001. The said Doctor has stated that the injury was on the left side portion of the abdomen lumber region. The injured was immediately admitted in the emergency ward on 14th July 2001. According to him the injury was caused with sharp weapon and operation was required. Necessary X-ray was taken and other tests like sonography were carried out. As per the report, near Kidney, hematoma

was found in the size of 7.4x4 cm. The deceased was given blood before the operation. The history was given to Dr. Minesh Mody by the son of the injured on the next day in the evening at about 4.45 pm. According to him the operation was performed on 14th July 2001 at about 6.30 am. The operation was performed by this witness, Assistant Professor Dr. Pinakin Shah and Dr. Minesh Modi. There was a hole at the place of the injury. Because of the hole in the Kidney supply of blood was reduced to intestine and there was a gap in the abdomen (Retroperitoneal). During operation the intestine was got stitched.

5.4 According to this witness, Dr. K.G. Patel had examined the patient in the morning at about 9.45 and his condition was good for two days after the operation performed on 14th July 2001. On 17th July 2001 at about 8.45pm Dr. Manoj Agrawal was called, who was also working as Assistant Professor. He was called because the pulse was on higher side and the breathing was fast and there was less supply of air in the lungs. Therefore treatment was started and on 18th July 2001 about 11 A.M. the second operation was performed and left hand side kidney was removed for which consent of the son of the injured was taken. It was stated that after the operation since the effect of anaesthetia was still continued, the patient was kept on artificial ventilation. His blood pressure was low and he was given Dopamine injunction through drip.

Thereafter it was noticed that the second kidney was also not functioning properly. No improvement was shown in the condition of the patient and his condition has become serious on 20th July 2001. Therefore the close relative of the injured was called and he was declared dead on 21st July 2001. In the cross-examination this witness has admitted that because of the injury the death is possible. He has also made it clear that he understood the word “likely to cause death”. Muddamal article was also shown to this witness.

5.5 In the cross examination an attempt was made to show that it was because of the negligence of the doctor the death was caused. It was also suggested that that the death might have caused due to infection because of the negligence in the operation. An attempt was also made to show that because of non-attention, the renal function which was normal has deteriorated because of the infection, as a result of which the death has occurred. It was also suggested that because of the failure of the operation stool has not passed and infection has caused and because of the negligence of the doctors death has caused.

5.6 The prosecution has also examined Dr. Mustaq Ahmed Shaikh (PW22) at Exh.93 who has carried out the postmortem. The injuries mentioned in the postmortem notes reads as under:

1. Laprotomy stiched wound on ant. Abdominal wall from Xiphystemum to 6 cm below umblicus in midline size – 26 cm.

2. 3.5 cm stitched wound on Lt. Lumber region. It is 11 cm Lateral & upwards to Umblicus on Lt. Side situated transversely.

3. Stitched wound on Rt. Side ant. Abdominal wall. The would is 8 cm lateral to umblicus on Rt. Side 2 cm inside. It, surgical drain wound.

4. Drain wound iliac fossa. It is round size 1 cm. It is 7 cm introlateral to amblicus on lt. Side.

5. Cellulities over Lt. Lower lateral chest, abdomen, buttocks and scortum. Stitched wound on rt cubital fossa. 5 cm traversely situated."

Postmortem report is on record which states the cause of death as cardiorespiratory failure as a result of complication of stab injury over abdomen.

5.7 The prosecution has also examined Chamanlal Nayak (PW24) at Exh.103 who has carried out the investigation and has recorded the fourth dying declaration on 16th July 2001.

5.8 The prosecution has also examined Rupabhai, PSI (PW25) of Palanpur City Police Station who registered the offence at Exh.110, Shri N.L.Desai, PSI, Panthawada Police Station Investigation officer at Exh.130 and Shri V.R.Patel, PSI, Panthwada Police Station at Exh.134. Prosecution has also examined other witnesses.

6.0 From the evidence on record it has been established that the appellant had gone to the cabin of the deceased along with accused nos.2 and 3. They had taken tea at the cabin. Thereafter some argument took place which enraged the appellant. The incident has occurred due to heated exchange of words and one knife blow was given by the appellant. The injured was removed to the hospital. Initially his condition was good. However, unfortunately later on he succumbed to the injuries. Considering the evidence on record and the injury caused to the deceased, we are of the considered opinion that the evidence of Dineshkumar (PW11-Exh.56) and Gaurishanker Joshi (PW-9-Exh.50) clearly establishes that the blow was given by the appellant-accused no.1. Learned Advocate for the appellant is not able to controvert this fact.

6.1 However, from the evidence on record It was not established that accused nos.2 and 3 had caused any injury to the deceased. They were not even identified in the test identification parade. We are therefore of the opinion that no case is made out on behalf of the State against the original accused nos.2 and 3.

6.2 It is required to be noted that with regard to accused no.4 no evidence was brought on record to establish his presence even prior to

the incident in question.

6.2 The Dying Declaration is at Exhibit 75. It states that the patient was fully conscious, well oriented and able to give oral statement. Champaklal stated that the appellant and other two unknown persons had come to his cabin, started quarreling, took out a knife and gave a blow to Chamapkal.

7.0 From the evidence on record it is clear that one blow was inflicted by the appellant which has caused damage to the kidney and two operations were required to be performed on the injured who has ultimately succumbed to the injury. The evidence of Dineshkumar (PW11-Exh.56) and Gaurishanker Joshi (PW-9-Exh.50) clearly shows that the appellant along with two unknown persons had come to the cabin. Initially they ordered for tea and they had taken tea. After taking tea they had also offered money and it is thereafter the argument took place. When the argument was at its peak, the appellant has taken out the knife and inflicted the blow. Only one blow was inflicted and thereafter the appellant and others drove away on motor cycle. These facts would show that the appellant had no intention of causing death of the deceased. There is nothing on record to suggest that the appellant had come to the cabin with a definite intention to pick up quarrel and to

cause death of Champaklal. However, the fact remains that he has used weapon and caused injury to Champaklal as a result of which he has expired. It is required to be noted that the accused had given the knife blow to the deceased over a trivial matter. It is also in the evidence initially the condition of Champaklal was good in the hospital. Considering these facts and circumstances, we are of the view that it will be appropriate to hold that the appellant has committed offence under section 304 Part I.

7.1 It is a well settled law that when the accused inflicts single knife blow after hot exchange of words, which resulted into death of the deceased, the conviction for murder can be modified to culpable homicide. In the case on hand, on the overall evidence brought on record shows that the appellant had knowledge and unable to accept that there was no intention to kill the deceased and therefore the offence will fall under section 304 Part I.

8.0 Taking into consideration the aforesaid discussion, and looking to the particular facts of the case, interest of justice would be met by modifying the order of sentence of rigorous imprisonment of 7 years to rigorous imprisonment for five years and an additional fine of Rs.50,000/-, in addition to the fine imposed by the Sessions Court, in default to suffer simple imprisonment for two years.

9.0 Appeal No.1325 of 2003 is partly allowed. The conviction of the appellant-accused Popatlal Govaram Thakar (original accused no.1 in Sessions Case No.210 of 2001) is upheld but the sentence imposed by judgement and order dated 10th October 2003 of rigorous imprisonment for seven years is modified to rigorous imprisonment of five years and additional fine of Rs.50,000/- (Rupees fifty thousand) in default, to suffer simple imprisonment for two years. The amount of fine shall be paid within a period of eight weeks from today. On deposit of the amount of fine as imposed by the Sessions Court, if not already paid, and also the amount of fine imposed by this Court shall be paid to Bhagwatiben Champaklal Joshi, widow of the deceased Champaklal Hiralal Joshi.

19.0 Appeal No.222 of 2004 filed by the State is hereby dismissed.

[A.R. DAVE, J.]

[K.S. JHAVERI, J.]

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